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In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DePASQUALE, County Court Judge of Seneca County, New York, et al.,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

BRIEF OF *AMICI CURIAE* THE DEADLINE CLUB, THE NEW YORK CITY CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

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Preliminary Statement

The Deadline Club, the New York City Chapter of the Society of Professional Journalists, Sigma Delta Chi ("Deadline Club") and the Society of Professional Journalists, Sigma Delta Chi ("Society") submit this brief *amici curiae* in support of the Petitioner in this proceeding, Gannett Co., Inc. All parties to this

proceeding have given their written consent to the filing of this brief, copies of which have been filed with the Clerk of this Court.

Interest of the *Amici Curiae*

The Deadline Club, an unincorporated professional association, is located in New York City. It is primarily an organization of working journalists affiliated with New York City's and the nation's major news organizations. It has a membership of 600, including such prominent journalists as Walter Cronkite and Mike Wallace of CBS News; Frank Blair, formerly of NBC News; Roone Arledge of ABC News and Sports; Gabe Pressman of WNEW-TV; Arthur O. Sulzberger and Peter Kihss of the *New York Times*, as well as journalists working for such major news organizations as The Associated Press, United Press International, *New York Daily News*, *Wall Street Journal*, *Women's Wear Daily*, and the three major news weeklies — *Time*, *Newsweek*, and *U.S. News and World Report*. Essentially, the membership of the Deadline Club consists of those reporters in New York City who would be locked out of covering pre-trial proceedings, if the New York State Court of Appeals decision in this case were allowed to stand.

The Society is the parent organization of the Deadline Club. The Society has some 35,000 members, primarily working journalists and journalism students, affiliated with over 250 chapters across the country. It is the largest organized group of journalists in the nation encompassing all aspects of the profession. For its part, the Society is fearful that a rule permitting the capricious closing of pre-trial proceedings will not only impede the work of its members in New York State, but could set the stage for similar restrictive rulings in other states as well.

In sum, both the Deadline Club and the Society feel that their members will not be able to report the news about the administration of justice, if they are forced to stand in the corridors outside of closed courtrooms.

Questions Presented

The *amici* adopt the Questions Presented, as set forth in the Brief of Petitioner Gannett Co., Inc.

Constitutional Provisions Involved

The *amici* adopt the Constitutional Provisions, as set forth in the Brief of Petitioner Gannett Co., Inc.

Statement of the Case

The *amici* adopt the Statement of the Case, as set forth in the Brief of Petitioner Gannett Co., Inc.

Summary of Argument

The *amici* make the following arguments:

I. The Lock-Out Of Journalists Under The Rule Adopted By The New York Court Of Appeals Is An Attempt To Evade The Tests Of *Nebraska Press Association* v. *Stuart* Against Prior Restraints, And In Fact These Tests Of *Stuart* Should Be Applied In This Case.

II. The American Public Has a Right To Know The Activities Of Its Judiciary And This Knowledge Is Essential In A System Of Self-Government.

III. The Functions Of Editors Should Be Left To Professional Journalists and Not Judges.

POINT I

THE LOCK-OUT OF JOURNALISTS UNDER THE RULE ADOPTED BY THE NEW YORK COURT OF APPEALS IS AN ATTEMPT TO EVADE THE TESTS OF *NEBRASKA PRESS ASSOCIATION* V. *STUART* AGAINST PRIOR RESTRAINTS, AND IN FACT THESE TESTS OF *STUART* SHOULD BE APPLIED IN THIS CASE.

In *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976), this Court brought to an end, except in the most extreme circumstances, instances in which a trial judge could prohibit the media from publishing or broadcasting information that he considered might be harmful to a defendant's right of fair trial. Generally, the kind of information that trial courts had restrained during the heyday of the gag order was news about confessions and admissions which the courts felt might turn out to be inadmissible at trial. Not atypically, the *Nebraska* case itself involved a court order restraining the media from publishing or broadcasting accounts of confessions and admissions made by the accused before trial. 427 U.S. at 539.

In the *Nebraska* case, in generally disallowing such restrictive orders, this Court tipped the scales heavily in favor of the interest of an open judiciary as against the theoretical threat to the fair trial of a criminal defendant.* Specifically, this Court held in *Nebraska* that, before a trial court could impose a prior restraint on the media, it must gauge (1) the nature and extent of the pre-trial publicity involved and its probable impact on prospective jurors; (2) the effectiveness of measures other than a restraining order in mitigating any prejudice that might be involved; and (3) the probable efficacy that such an order would

*As to those rare instances when a prior restraint order can be imposed, the *Nebraska* Court quoted Learned Hand to the effect that they are justified only when "the gravity of the 'evil,', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 427 U.S. at 562.

have in reducing the dangers to the accused's right for a fair trial.

Only if these strict criteria are met, this Court held, can a restraining order against the media be entered, under the First Amendment of the Constitution.

The *amici* argue that at the very least, these tests of *Nebraska Press Assn.*, or something very similar, should be required before trial courts can lock-out the press from proceedings at which the admissibility of confessions and admissions by the accused is determined. In short, before a trial judge is allowed to clear a courtroom, he should be required to make a factual assessment of the nature and extensiveness of the pre-trial publicity involved and its probable impact on jurors. He should also be required to consider other measures that might mitigate possible prejudice, such as the devices discussed in the *Nebraska* case from *Sheppard* v. *Maxwell*, 384 U.S. at 357-362, *i.e.*, change of venue, postponement of trial, questioning of prospective jurors, and clear instructions to each juror. 427 U.S. at 563. Finally, before ordering a press lock-out, the trial court should have to make a judgment as to the efficacy of such a measure in reducing the alleged dangers to the defendant's right to fair trial. As regards this final consideration, already extensive publicity about a confession would make a lock-out of the press at a proceeding to consider the admissibility of this confession pretty much useless.

The *amici* argue that the test of *Nebraska Press Assn.* is appropriate to apply to the case at bar because the press' First Amendment right to gather the news* is closely akin to the

*This Court gave constitutional recognition to the press' right to gather the news in *Branzburg* v. *Hayes*, when it said, "... news gathering is not without its First Amendment protections...". 408 U.S. 665, 707 (1972).

press' right under the First Amendment to be free from prior restraint.* In fact, if anything, the right of the press to gather the news is even more important to the press' editorial function than the absence of prior restraint, as conceptually it is a restraint on the press even more prior than a prior restraint. Furthermore, a press which is locked out of a news event does not even have the facts to argue that what it would report is deserving of public dissemination. At least the press has this opportunity in the prior restraint area.

In this discussion of the press' news gathering right, it is important to note that the *amici* are not arguing in favor of an affirmative duty by government to provide special press access to a news site or a news event. The *amici* recognize that this Court has held "that the Constitution [does not impose] upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817 (1974). *Also see, Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974).** In fact, as a

*Some courts have considered interference with the press' right to gather the news as falling under the definition of prior restraint. *See, e.g., CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

**This Court, in *Houchins* v. *KQED*, 38 CCH S. Ct. BULL. p. B3806 (1978), has recently affirmed the holdings of *Pell* and *Saxbe* in the media access to prison context. As the three-justice majority stated in *Houchins*, reversing the Court of Appeals below:

> "We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions."

Id. at B 3819.

One might note the obvious that courtrooms, the scene of constitutionally mandated public trials, are neither prisons, nor mental institutions.

Furthermore, although there is language in the three-justice majority opinion in *Houchins* which categorically states that,

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> "Neither the First Amendment nor Fourteenth Amendment mandate a right of access to government information or sources of information within government control."

Id. at B3820,

the basic thrust of the opinion follows *Pell* and *Saxbe*, to-wit, that

> "the media has no *special* right of access to [a jail] different or greater than that afforded the public generally." [Emphasis added]

Id. at B3820-21.

In addition, it can be argued that the reach of the *Houchins* majority doctrinally extends only as far as the concurring opinion of Mr. Justice Stewart, whose vote was necessary to overcome the three-justice dissent. Mr. Justice Stewart, in his concurring opinion, specifically noted that:

> ". . . the First and Fourteenth Amendments require the Sheriff to give members of the press *effective* access to the same areas [as those where members of the public were permitted]."

Id. at B3823.

"[E]*ffective* access" is defined in the concurrence as access to the jail "at reasonable times and hours" and with the use by the media of "cameras and recording equipment."

Also, Mr. Justice Stewart said that he did "not foreclose the possibility of further relief for *KQED* [the television station seeking access] on remand."

The three-justice dissenting opinion, which Mr. Justice Stewart might ultimately convert to a majority, states flatly that:

> "The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas."

Id. at B3836.

Thus, in summary, even the most restrictive reading of *Houchins* does not move the Court beyond the parameters of *Pell* and *Saxbe*, to the effect that the press enjoys no *special* right to access as against the general public.

general proposition, a special press access right granted, or withheld, at the whim of government might not be good policy, as it might color the necessary disinterest that the press should have in its coverage of government, and create a press dependent on favors granted by government.

But special press access is *not* the question before this Court. In the case at bar, the media seek not special access to a place where the public has been excluded, but rather the press seeks to be let in to a place that has traditionally been open to the public in this country, *i.e.*, the courtroom. Furthermore, these heretofore open courtrooms, it is worth noting, are maintained by public funds, the judges and court personnel are on the public payroll, and the business conducted therein is public business.

Up until now, courtooms have been open to press and public, except in the most extraordinary circumstances. As this Court noted in *Craig* v. *Harney*, 331 U.S. 367 (1947):

> "A trial is a public event. What transpires in the courtroom is public property."

331 U.S. at 374.

Even in those extraordinary circumstances of exclusion, lock-out orders are tailored as narrowly as possible.*

Nor should deviation from the open court tradition be permitted simply because the proceedings are pre-trial, rather than the trial itself. At the pre-trial proceeding, there is a public judge going about the public's business. There is also an expenditure of public funds, and thus the press should be watching at these proceedings as well.

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*See, e.g., *Estes* v. *Texas*, 381 U.S. 532 (1965), where the court makes clear that, although television cameras should have been excluded under the facts of that case, broadcast journalists themselves emphatically should not.

In *Nebraska Press Assn.*, this Court set forth the extraordinary lengths to which a trial court should have to go to before it could order the media not to publish or broadcast information that was in its possession. Now, quite frankly, to evade these strictures, some courts are locking out the press rather than issuing clearly prohibited gag orders. A most appropriate response by this Court would be to apply the *Nebraska Press Assn.* "prior restraint" test to the lock-out situation as well. The interests in the two situations are almost identical. So should be the judicial response.

POINT II

THE AMERICAN PUBLIC HAS A RIGHT TO KNOW THE ACTIVITIES OF ITS JUDICIARY AND THIS KNOWLEDGE IS ESSENTIAL IN A SYSTEM OF SELF-GOVERNMENT.

"For speech concerning public affairs is more than self-expression; it is the essence of self-government", this Court noted in *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). In recognition of this principle, this Court has greatly cut back the right of recovery of public officials who are plaintiffs in defamation actions. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The reason, of course, that free speech about public affairs is *more* than self-expression is that, in a free system of self-government, what the public knows about its government is essential to the operation of the system. For, without knowledge of public affairs, the ultimate governors, who are the people, cannot rule reasonably or intelligently.

This thought is hardly a new one. As James Madison wrote,

> "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both."

9 Writings of James Madison 103 (G. Hurst ed. 1910).

More recently, a distinguished legal commentator discussed the same principle. He said:

> "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*" [Emphasis in the original]

A. Meiklejohn, *Free Speech, and Its Relation to Self-Government*, at 37.

This Court, in the area of broadcast regulation, has also recognized that the public's acquaintance with information is a First Amendment value of even higher importance than the traditionally protected right of free expression. This Court noted in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), in upholding the Fairness Doctrine:

> ". . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*" [emphasis added]

395 U.S. at 390.

Also, in recent commercial speech cases, this Court has recognized a First Amendment right of consumers to a free flow of commercial information. *See, e.g., Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). This First Amendment right to information was considered a higher value than the self-expression of the groups involved to regulate their members' conduct.

Finally, and specifically relating to the importance of a flow of information about the judiciary to the public, this Court said in *Nebraska Press Assn.*:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of the system is of crucial import to citizens concerned with the administration of Government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."

427 U.S. at 527 (Brennan J., concurring).

See, also, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-496 (1975); *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966).

It is especially important that the operation of the courts during pre-trial proceedings be open to public view. Over the past two decades, this Court, in a whole series of decisions relating to confessions, searches, line-ups and police interrogations, *see, e.g., Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *United States* v. *Wade*, 388 U.S. 218 (1967), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), has made the pre-trial proceeding in many instances more important than the trial itself. Thus, whether a confession, or the fruits of a search, or an admission made during an interrogation, or a line-up identification are admitted or not, in many instances determines whether a criminal defendant will be found guilty or innocent. To permit this often controversial process to be conducted in secret, as the New York Court of Appeals would allow in this case, would thus allow the core of the criminal justice process to take place behind closed doors. This truly would be a

mutilation of the thinking process of the community, and a prologue to a tragedy or a farce, or both.*

With the public's right to know as crucial as it is in the case before this Court, either a *per se* rule mandating the openness of pre-trial proceedings should be established by this Court, or, at the very least, the test of *Nebraska Press Assn.* should be applied. The principle that this case involves, close as it is to the essence of self-government, demands no less.

POINT III

THE FUNCTIONS OF EDITORS SHOULD BE LEFT TO PROFESSIONAL JOURNALISTS AND NOT JUDGES.

In the context of holding that broadcaster editors should not be forced to air the editorial opinions of others, this Court stated in *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 124-125 (1973):

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors — newspaper or broadcast — can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility — and civility — on the part of those who exercise the guaranteed freedoms of expression.

In a similar vein, and speaking specifically of judges assuming the role of editors in the prior restraint area, this Court said in *Nebraska Press Assn.*:

*So important is public knowledge of the activities of the judiciary that it could be argued that access to this information by the public is an extra-constitutional right, *i.e.*, one never surrendered to federal authority but rather is reserved for the people, as recognized under the Ninth and Tenth Amendments. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

> ". . . the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges." [Citations omitted]

427 U.S. at 613 (Brennan, J. concurring).

The ultimate impact of the case at bar, if the rule of the New York Court of Appeals is permitted to stand, would be editorial. It would mean that a trial judge in a case such as this would have the editorial power to edit from a newspaper news about a particular event. That a court would exercise this power by means of locking the courtroom door rather than by donning a green eye shade and sitting in an editor's chair is immaterial. The effect is the same in both instances — news from the courtroom would simply not appear in the newspaper.

Furthermore, even though the prosecutor and the defense would be present at these closed proceedings, their interests could well be antithetical to the general public interest. As a matter of fact, this is what happened in the case at bar when the prosecution acquiesced to the defense's request to bar the press and the public from the courtroom.

Thus, for the reason that judicial editing should only be allowed in the most extreme instances, the New York Court of Appeals opinion in the case at bar should be reversed.

Conclusion

For each of the above-discussed arguments, the *amici* urge that the New York Court of Appeals decision in this matter should be reversed.

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